80-6127

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

NO. A-542

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT HENRY McDOWELL,

PETITIONER,

VERSUS

THE STATE OF NORTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Robert Henry McDowell, who is now confined in North Carolina Central Prison at Raleigh, North Carolina, asks leave of this Court to file the attached Petition For A Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit and counsel's affidavit in support of this motion are attached hereto.

WHEREFORE, petitioner, Robert Henry McDowell, requests that he be granted leave to proceed in forma pauperis in this Court.

DATE: JANUARY 29, 1981

RESPECTFULLY SUBMITTED,

F. JEFFERSON WARD, JR.
1412 Elm Street (P.O. Box 1650)
Sanford, North Carolina 27330
Telephone: (919) 776-5133

IN FORMA PAUPERIS AFFIDAVIT

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
No. A-542
[Insert appropriate court]

Robert Henry McDowell
(Petitioner)

v.

STATE OF NORTH CAROLINA,
(Respondent(s))

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, Robert Henry McDowell, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]
   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
   July 20, 1979 - $575.00 per month

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes [ ] No [X]
   b. Rent payments, interest or dividends? Yes [ ] No [X]
   c. Pensions, annuities or life insurance payments? Yes [ ] No [X]
   d. Gifts or inheritances? Yes [ ] No [X]
   e. Any other sources? Yes [ ] No [X]

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

   Yes [ ] No [X] (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes [ ] No [X]

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert Henry McDowell
(Petitioner's signature)

State of North Carolina.

County (City) of Wake.

Robert Henry McDowell, being first duly sworn under oath,
(Name of Petitioner)
presents that he has read and subscribed to the above and states that the information therein is true and correct.

Robert Henry McDowell
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this

26 day of January, 19 81.

PAUL R. HUGHES NOTARY PUBLIC WAKE COUNTY, N.C.

My Commission Expires April 22, 1984

Paul R. Hughes
Notary Public or other person authorized to administer an oath

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ NONE on account to his credit at the Central Prison institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Central Prison institution: NONE

Paul R. Hughes Correctional Sgt
Authorized Officer of Institution, Correctional Sergeant

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY, 1981

NO. A-542

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

---

ROBERT HENRY McDOWELL,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

F. Jefferson Ward, Jr., being first duly sworn according to law, deposes and says:

1. I am the counsel for petitioner in his Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

2. In addition to the information contained in the petitioner's affidavit in support of his motion for leave to proceed in forma pauperis, I submit the following in support of petitioner's motion. Petitioner was found to be an indigent in the Superior Court of Lee County, North Carolina, and the undersigned was appointed to represent the Petitioner. In October, 1979, James W. Hoyle, attorney at law, Sanford, North Carolina, was appointed in the Superior Court of Lee County, North Carolina, as co-counsel. On December 11, 1979, Mr. Hoyle and the undersigned were appointed by Superior Court Judge Donald L. Smith to represent Petitioner in appeal to the North Carolina Supreme Court. Petitioner was sentenced to death by the Superior Court of Johnston County, North Carolina on a charge of first-degree murder. The Supreme Court of North Carolina affirmed petitioner's conviction and sentence. The present proceeding has been commenced, pursuant to 28 U.S.C. §1257(3), by a petition for a writ of certiorari to the Supreme Court of North Carolina on grounds that (1) petitioner's death sentence was imposed by a capital sentencing proceeding in which the sentencing discretion of the jury was virtually unguided, in violation of the Eighth and Fourteenth Amendments.

F. Jefferson Ward, Jr.

F. JEFFERSON WARD, JR.

Subscribed and sworn to

before me this 29th day

of January, 19 81.

Janet T. Carter

Notary Public

My Commission Expires: 09-13-81

RECEIVED
FEB 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

---

NO. A-542

---

ROBERT HENRY McDOWELL, Petitioner,

V.

STATE OF NORTH CAROLINA, Respondent.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

---

F. JEFFERSON WARD, JR.
1412 ELM STREET (P.O. BOX 1650)
SANFORD, NORTH CAROLINA 27330
(919) 776-5133

COUNSEL FOR PETITIONER

JANUARY 29 , 1981

## QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEEN AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE 15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

TABLE OF CONTENTS


| | Page: |
|---|---|
| Question Presented | i |
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Relevant Constitutional and Statutory Provisions | 2 |
| Statement of the Case | 3 |
| How Federal Question Was Raised Below | 5 |
| Reasons For Granting The Writ | 6 |
| THE IMPOSITION OF A SENTENCE OF DEATH UPON THE PETITIONER WHEN THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRICTED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE 15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND | 6 |
| Conclusion | 8 |

Appendices

Appendix A (Opinion of the Supreme Court of North Carolina)

Appendix B (Order of the Supreme Court of North Carolina Staying Execution)

Appendix C (North Carolina General Statute 15A-2000)

Appendix D (Issues and Recommendations as to Punishment)

TABLE OF AUTHORITIES


Page:

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 33 L.Ed. 2d 346 (1972) .... 6

Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759 at 1764-65 (1980) ..... 7

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976) ..... 6, 7

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2d 929 (1976) ..... 6, 7

North Carolina v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979) ..... 6, 7

Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976) ... 6, 7

State of North Carolina v. Robert Henry McDowell, No. 80 (1980) ..... 1

Constitutional Provisions

Constitution of the United States of America

Eighth Amendment ..... i, 2, 6, 8

Fourteenth Amendment ..... i, 2, 6, 8

Statutes

Title 28 U.S.C. §1257(3) ..... 2

North Carolina General Statute 15A-2000 ..... i, 2, 6, 8

North Carolina General Statute 15A-2000(d) ..... 2, 5

North Carolina General Statute 15A-2000(d)(1) ..... 2, 8

North Carolina General Statute 15A-2000(d)(2) ..... 2, 6, 7

North Carolina General Statute 15A-2000(f)(9) ..... 2, 6

North Carolina Rules of Appellate Procedure

North Carolina Rule of Appellate Procedure 31(g) ..... 1

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

NO. A-542

---

ROBERT HENRY McDOWELL,

Petitioner,

VERSUS

STATE OF NORTH CAROLINA,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner, ROBERT HENRY McDOWELL, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina affirming the conviction and sentence of death. The judgment of the Supreme Court of North Carolina was entered on November 4, 1980, in State of North Carolina v. Robert Henry McDowell, No. 80; No petition for rehearing was filed with the North Carolina Supreme Court as Rule 31(g) of the North Carolina Rules of Appellate Procedure provides "No Petition in Criminal Cases. The Courts will not entertain petitions for rehearing in criminal cases."

OPINION BELOW

The opinion of the Supreme Court of North Carolina has not yet been reported. The official citation of the opinion is State v. Robert Henry McDowell, ____S.E. 2d ____(N.C. 1980; No. 80). The opinion is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of North Carolina were filed on November 4, 1980, and execution date of November 21, 1980, was set. On November 17, 1980, an order staying the execution upon pendancy of a petition for a Writ of Certiorari to the United States Supreme Court was signed by Joseph Branch, Chief Justice of the North Carolina Supreme Court, a copy of which is attached hereto as Appendix B.

This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(3).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the North Carolina General Statutes:

North Carolina General Statute 15A-2000:

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

North Carolina General Statute 15A2000(d):

(d) Review of Judgment and Sentence.

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

North Carolina General Statute 15A-2000(f)(9)

(f) Mitigating Circumstances. Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s.2.)

## STATEMENT OF THE CASE

On July 14, 1979, Carol Ann Hinson, age 4, and Patsy Ann Mason, age 14, were living in the house located at 224 Maple Avenue, Sanford, North Carolina, with John and Sarah Mason. John and Sarah are Patsy's parents and Carol's step-grandfather and grandmother, respectively. After playing outside in the yard part of that day and watching some television that night, the two girls went to their bedroom some time after 11:00 P.M. that night leaving John asleep in his bedroom. The Masons' bedroom and the girls' bedroom are separated by two bathrooms. The girls' bedroom has a door leading to a little entryway which has an outside door which opens onto Third Street in Sanford, North Carolina. At some point between 11:00 P.M., July 14, 1979, and 1:00 A.M., July 15, 1979, they heard a knock on the outside door. They went to open it and saw a man standing there. He then came into the bedroom. The man had a big knife in his hand and two pipes with chains on them in his back pocket and stated he had gotten there on a bicycle. After some discussion he stated he was going to rape Patsy. Patsy stated he was not. At some point Carol tried to leave the room, and the man grabbed her and threw her on the double bed in the room. Patsy took Carol in her arms and the man began to hit them with the knife. He then left. Around 1:00 A.M., John Mason woke up and went to check on the girls. He had heard nothing unusual. When he got to the girls' bedroom, he noticed the outside door was open and went over and closed it. When he turned around he saw Patsy sitting on the commode in the bathroom and noticed that she was injured. He ran back to his bedroom and told his wife to call the rescue squad. He then went back into the bedroom and saw Carol at the foot of the bed. There was blood in the bathroom and on the floor. He picked Carol up, went back through the house and out the front door where he met Officers Klomparens and Brown of the Sanford Police Department. Officer Klomparens assisted Mr. Mason in putting Carol in the rescue squad ambulance. He then assisted Officer Brown in helping Patsy to the ambulance.

Patsy and Carol were then taken to Lee County Hospital. Carol was pronounced dead at the hospital, and Patsy was taken to Duke Hospital, Durham, North Carolina, for treatment.

When Robert Henry McDowell, the defendant in this matter, was placed on parole he executed a parole agreement, a condition of which required that Robert "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission."

He was, therefore, on July 20, 1979, in technical custody of the N.C. Parole Commission for the reason that all parolees are technically in the custody of said commission.

On Friday, July 20, 1979, Charles Mann, who is employed with the adult division of Probation and Parole, Department of Corrections, and who was the parole officer of Robert Henry McDowell, the defendant in this case, went to Robert's place of employment at Carolina Macomber, Inc., Sanford, North Carolina, and asked Harold Adcock, Robert's supervisor, if he could see Robert. Mr. Adcock brought Robert to see Mr. Mann. Mann told Robert that he needed to have a recent photo of Robert made for his (Mann's) files. Mann told Robert that one or two judges had requested that a recent photo be placed in the file. Robert went down to Mr. Mann's office after he got off work and three photos of him were made, at least one of which showed Robert with his toboggan cap on and one with it off. Previously that day, Friday, July 20, 1979, Mann had had a conversation with Gene Stewart, an agent with the North Carolina SBI during which he learned that Robert was under investigation by the SBI and the Sanford Police Department for the offenses involved in this matter. Stewart asked Mann if he could look at his file on Robert and did so. After seeing the photo of Robert in the file, Stewart asked Mann if he could get an updated photo of Robert. Mann was aware at the time that the photo was to be used for identification purposes but he did not advise Robert of that. He told Robert only that he needed a photo to update his file. After the photos were taken, Mann turned the camera over to the Sanford Police Department who then developed it. This was different from the normal procedure of Mann sending the film to Fayetteville, North Carolina, to be developed.

After the film was developed, a picture was placed in a manila folder with six other photos of black males and that folder along with another folder with seven photos of black males was taken by Agent Stewart to Duke Hospital on the night of Friday, July 20, 1979. The folder without Robert's photo contained seven photos which were obviously "mug shots" from the files of the Sanford Police Department. The folder with Robert's photo contained seven photos, five of which had the same background and two had varying backgrounds, one of these two being Robert's photo.

Upon arriving at Duke, Agent Stewart went to the room of Patsy Ann Mason. Agent Mary Shepp of the SBI was already there and had been there for quite a while. Agent Stewart instructed Patsy to see if she could point out in the photos

in the manila folders the person who had assaulted her. She pointed out the photo of Robert.

On Saturday, July 21, 1979, a search warrant for the premises of Frances Jenkins was obtained by John Walker, who was at that time an agent with the SBI. Robert had been living with Mrs. Jenkins and her two children, a daughter, six, and a son, two, for approximately nine months prior to this incident. The search warrant was executed with the following items being found: ten-speed bicycle, pair of nunchukhs, a machete, a flashlight, black visor cap, pair of check cutoff pants and a pair of men's purple underpants. Blood was found on the machete and visor cap, but it could not be identified as human origin. The visor was at home when Frances returned before Robert came in. Human blood was found on the flashlight, but it could not be identified. Robert was arrested on July 21, 1979. No fingerprints were found of defendant.

The case first came on for trial for the November 13, 1979, Term in Lee County, North Carolina, which case ended in a mistrial. The case was then transferred to Johnston County, North Carolina, for trial on December 3, 1979. On Tuesday, December 11, 1979, the guilt phase of the trial was concluded with the jury finding petitioner McDowell guilty of first degree murder and assault with deadly weapon with intent to kill inflicting serious injury. The trial then proceeded to the sentencing phase. In the sentencing phase the jury found aggravating circumstances which were identified and mitigating circumstances but failed to state what the mitigating circumstances were. The jury also found that the aggravating circumstances outweighed the mitigating circumstances and recommended the death penalty. See Appendix D.

## HOW FEDERAL QUESTION WAS RAISED BELOW

On appeal, the Supreme Court of North Carolina must, pursuant to North Carolina General Statute 15A-2000(d) (Appendix C) automatically review in every case involving the death penalty the punishment and any errors assigned on appeal. In addition in the oral argument before the North Carolina Supreme Court it was argued that it was error for the death sentence to be imposed when mitigating circumstances were found by the jury but it was not stated as to what the mitigating circumstances were.

## REASONS FOR GRANTING THE WRIT

THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE 15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution invalidate any scheme for the imposition of the death penalty when either the judge or jury is permitted to impose that sentence as a matter of unbridled discretion. After the Furman decision, a number of states enacted new statutes pertaining to the imposition of the death penalty.

The statutory provisions for imposing the death penalty were upheld in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). Each of these cases shared a similar characteristic: each left the decision to impose the death penalty to the guided discretion of either the judge or the jury.

North Carolina has adopted a death penalty statute modeled upon the Georgia statute approved in Gregg, but in cases where juries find "Any other circumstances arising from the evidence which the jury deems to have mitigating value," (North Carolina General Statute 15A-2000(f)(9)), the juries have not been given proper guidance in how to apply such mitigating circumstances against aggravating circumstances. Consequently, the "guided discretion" doctrine propounded in Gregg, Proffitt and Jurek appear to be infringed upon to the extent it is not applicable in those cases where "any other mitigating circumstance or circumstances" are found by a jury.

North Carolina General Statute 15A-2000(d)(2) provides:

> "The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court (of North Carolina) upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ... "

In North Carolina v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), the North Carolina Supreme Court stated "If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh

any mitigating circumstances in a sufficiently substantial number so as to call for the imposition of the death penalty." See State v. Barfield, 298 N.C. at 351, 259 S.E.2d at 542.

In this case in response to the issue of "Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?" the jury answered "Yes." (See Issues and Recommendations As To Punishment attached as Appendix D). The jury did not, nor was it required by statute to state what the mitigating circumstance or circumstances were. It seems very difficult then to determine if under North Carolina General Statute 15A-2000(d)(2) "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ..." or if the mitigating circumstances are outweighed in a "sufficiently substantial manner so as to call for the imposition of the death penalty." North Carolina v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979). How can an appellate court determine if the jury has indeed used "guided discretion" when it does not know all the basis of the jury's decision? There is no way to determine the method and rationale used by the jury in reaching its decision, hence how can it be determined if it was arbitrary? No where was there any guidance to the jury as to whether to consider the mitigating versus the aggravating circumstances in either a qualitative or quantitative sense. It is submitted the jury could have computed thusly: three aggravating circumstances against one or two mitigating circumstances, therefore, the aggravating circumstances outweigh the mitigating circumstances. It seems the rationale gleaned from Gregg, Proffitt and Jurek require juries to have sufficient guidance to prevent arbitrary decisions but if appellate courts don't know the full basis of the decision, that is, what mitigating circumstances as opposed to what aggravating circumstances were found and whether or not the comparison is qualitative or quantitative then the appellate courts cannot determine if, in fact, the jury has exercised "guided discretion."

The sentencer's discretion must be channelled by "clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a death sentence." Godfrey v. Georgia, ____U.S.____, 100 S. Ct. 1759 at 1764-65 (1980). It is submitted that it cannot be determined if the sentencer's discretion was properly channelled if the basis for the sentencer's decision or the rationale of his decision is not known. Also, the process for imposing a death penalty cannot rationally be

reviewed if the reviewer does not know the full basis for the decision.

Further, North Carolina General Statute 15A-2000(d)(1) provide for automatic review by the Supreme Court of North Carolina when the sentence of death is involved and that the punishment shall be reviewed.[1] Of what purpose is automatic review if the appellate court does not know what comparisons were made or the extend of said comparisons, if any? Again, if mitigating circumstances found by the jury are not known how can an appellate court determine if "guided discretion" was involved? How can there be meaningful appellate review? It is submitted that North Carolina General Statute 15A-2000 et seq. is not requiring the jury to state what mitigating circumstances it finds in violation of the Eighth and Fourteenth Amendments.

## CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

JANUARY 29, 1981

RESPECTFULLY SUBMITTED

F. Jefferson Ward, Jr.

F. JEFFERSON WARD, JR.
1412 ELM STREET (P.O. BOX 1650)
SANFORD, NORTH CAROLINA 27330
Attorney for Petitioner

1 North Carolina General Statute 15A-2000 (d)(1) reads as follows: "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal."

# APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1980

STATE OF NORTH CAROLINA )
)
v. ) No. 80 - From Johnston
)
ROBERT HENRY McDOWELL )

Appeal by defendant from judgments of Smith, J., entered at the 3 December 1979 Criminal Session of Johnston Superior Court.

Having entered pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with the crimes of (1) first-degree murder and (2) assault with a deadly weapon with intent to kill inflicting serious injury. The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 et seq. Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to determine his sentence for first-degree murder following his conviction of that charge.

During the guilt determination phase of trial, the state introduced evidence which tended to show:

On 14 July 1979, Carol Ann Hinson, age four, and Patsy Ann Mason, age fourteen, were living in the home of Patsy's parents, John and Sarah Mason, in Sanford, North Carolina. The Masons were Carol's step-grandparents. Sometime after 11:00 p.m., on said date, the girls went to bed.

The two girls shared the same bedroom. At some point between the time they went to bed and 1:00 a.m., they were awakened by a knock on the door at the end of an entryway which led from their bedroom to the outside. Both girls got out of bed and went to the door.

Without asking the identity of the early-morning caller, ~~Carol~~ Patsy opened the door slightly and saw a man. The visitor was a black man with large eyes and a big nose; he was wearing a dark pullover shirt and blue jeans and his hair was plaited. ~~Carol~~ Patsy identified defendant as being the man she had seen standing outside of the door that morning. At the time he was first seen by the two girls, defendant was carrying a machete which Patsy described as being approximately two feet long.

As Patsy tried to close the door, defendant entered the house.

Upon entering the house, defendant greeted both girls by their names, even though Patsy had never seen him before that night. Defendant went into the girls' bedroom and sat upon the bed. As the girls sat down on the bed, defendant began talking with them, specifically asking Patsy if she would like to go bicycle riding with him. Patsy insisted that she could not go bicycling with him.

After declining defendant's invitation to go bicycling, Patsy observed that defendant still held a machete in his hand. Upon telling Patsy that he had purchased the knife at a discount store in Sanford, defendant asked her if her parents were asleep. After Patsy replied affirmatively, defendant warned her to be quiet and not make any noise otherwise he would cut her with the knife.

Throughout this time, defendant had been tickling Carol. After warning Patsy to remain still, defendant made two attempts to get Carol to leave the room by suggesting that she go to the bathroom. In both instances, the child refused to follow the suggestion. After each attempt to get the four-year-old out of the room, defendant turned to Patsy and told her that he was going to rape her. On both occasions, Patsy rebuffed his statement. In the first instance, defendant did nothing except resume tickling the younger child, Carol. After the second instance, however, as Carol was making her way out of the bedroom, defendant grabbed her and threw her on the bed whereupon Patsy picked her up and held her in her lap.

As Patsy held Carol in her arms, defendant began to strike at the children with the machete. Despite the protests and other resistance of the two girls, defendant continued his attack upon them. After Patsy was struck on her head by defendant's knife, she lost consciousness which she did not regain until she awoke as a patient at Duke Medical Center in Durham. While she was at the Medical Center, she was treated for injuries which included lacerations about her head, as well as to a wrist and several fingers. After inflicting numerous wounds to the two children, defendant left the house.

At approximately 1:00 a.m., Mr. Mason awoke. He had fallen asleep at about 11:00 p.m. while he was watching television. It was his custom to look in on the children before he went to bed each night. As he walked through the kitchen towards the girls' bedroom, Mr. Mason observed that the outside door at the end of the entryway was open. After shutting the door, he turned around and saw Patsy sitting in a nearby bathroom. Patsy's face was covered with blood and the bathroom had been bloodied from her wounds. After wiping Patsy's face with a washcloth so that she could see, Mr. Mason went to the bedroom which he shared with his wife and awakened her. Upon telling his wife to summon the rescue squad because "something had happened to the children", Mr. Mason went into the girls' bedroom and found Carol lying at the foot of a bed. Carol was pronounced dead on arrival at Lee County Hospital in Sanford. A subsequent autopsy revealed that she had been wounded nine times. Six of the wounds were to her head; her left arm had been cut at least three times; and on her right hand, her thumb, as well as her index finger, had been amputated at the middle joint.

Defendant did not offer any evidence.

Defendant was found guilty as charged and the court convened a sentencing hearing before the same jury in order to determine the sentence to be imposed on the murder conviction. During this phase of the trial, the state introduced evidence which tended to show that defendant had pled guilty to a charge of second-degree murder in Cumberland County in 1970. On 31 October 1977, he was paroled and until the time of his arrest on 21 July 1979, he was under the supervision of the Department of Correction.

During the sentencing hearing, defendant presented evidence which tended to show that after his release from prison, he had been employed in the Sanford area as a welder. Those with whom defendant worked testified that he had a good work record and got along well with others.

Issues with respect to punishment were submitted to and answered by the jury as follows:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER: Yes.

(1) Had Robert Henry McDowell been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER: Yes.

(3) Was this murder for which defendant stands convicted part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person?

ANSWER: Yes.

Issue Two:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER: Yes.

(1) Robert Henry McDowell has no significant history of prior criminal activity.

ANSWER: No.

(2) Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER: Yes.

Issue Four:

Do you unanimously find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER: Yes.

The jury recommended that a sentence of death be imposed upon the defendant. Pursuant thereto the court imposed the death sentence.

On the felonious assault charge, defendant was sentenced to twenty years imprisonment.[1]

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the state.

F. Jefferson Ward, Jr., for defendant-appellant.[2]

BRITT, Justice.

We find no prejudicial error in either phase of defendant's trial and conclude that the verdicts and judgments should not be disturbed.

PHASE I - GUILT DETERMINATION

By his first assignment of error, defendant contends that the trial court erred in denying his motion for the appointment of additional counsel from Johnston County. There is no merit in this assignment.

It is manifest that the state has the responsibility to provide an indigent defendant with the effective assistance of counsel and the other necessary resources which are incident to presenting a defense in a criminal prosecution. G.S. § 7A-450 (1969); State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979). However, the right of a criminal defendant to court appointed counsel does not include the right to require the court to appoint more than one attorney unless there is a clear showing that the interests of the defendant are not being adequately represented by the counsel already appointed. State v. Barfield, supra. While this precept embodies a consistent standard of proof to guide its implementation, it is apparent that its application will produce conclusions which will vary depending upon the nature of individual cases. It is with this consideration in mind that we turn to a brief examination of the facts of the present case as they relate to this assignment of error.

---

[1]Defendant's motion to bypass the North Carolina Court of Appeals on the assault conviction was allowed by this court 5 March 1980.

[2]In addition to Mr. Ward, defendant was also represented at trial and on appeal by the Honorable J. W. Hoyle of Sanford. However, Mr. Hoyle died between the time defendant's brief was filed and the time the appeal was argued.

Although defendant was indicted by the Lee County Grand Jury, he was convicted at a trial which was held in Johnston County. Defendant was initially brought to trial in Lee County in November 1979. However, after the jury had been impaneled, there was an attempted jailbreak in Sanford which received extensive attention from the news media. Upon motion of defense counsel, the presiding judge declared a mistrial and ordered a change of venue to Johnston County where the case was brought on for trial on 3 December 1979.

The essence of defendant's argument is that his right to due process of law could be effectively safeguarded only by the appointment of an attorney from Johnston County. Defendant contends that such an attorney would be in a superior position to assist defense counsel, who were members of the Lee County bar, in the selection of a jury. In support of his argument, defendant suggests that the district attorney was in an unfair strategic position to try this case in that he was a native of Johnston County, and, as such, he was better equipped to select a jury which would be sympathetic to the state's case. We are not impressed with this argument.

Upon a finding of indigency, defendant had been provided with the services of court-appointed counsel. In fact, by the time defendant's case was called for trial, the initial appointment of counsel had evolved to the point where defendant was represented by two court-appointed attorneys. Together with Harnett County, Lee and Johnston Counties constitute the Eleventh Judicial District. It is commonplace in North Carolina for attorneys who live in one county to try cases in other counties in their judicial district, as well as in other districts of the state. Several of our judicial districts are composed of rural counties whose populations are of a low to medium density. Though the geographical dimensions of these districts may be rather substantial, the demographics of the population within a particular district will be generally consistent throughout the unit. With the development of modern communications, as well as the

construction of an extensive transportation system, many attorneys no longer confine their practices to the areas immediately surrounding their homes.

It is apparent from the record before us that the crimes which resulted in judgments against defendant are of such a nature as to provoke interest among residents in the area in the subsequent proceedings against defendant. The possibility of an irreparably prejudiced venire was vitiated by the change of venue which removed the prosecution to Johnston County. While the change of venue did nothing to lessen the severity of the crimes or the seriousness of the accusations against defendant, the change of venue did serve to place the prosecution in an area less likely to be tainted with preconceived notions about defendant's guilt or innocence, particularly in light of the attempted jailbreak in Sanford. Nor would a venire which was drawn from the population of Johnston County be as likely to have individuals who were interested in the disposition of this case because of affinity or consanguinity.[3] It would seem, therefore, that Johnston County was a more favorable venue from the standpoint of the defendant's right to a fair trial notwithstanding the fact that the district attorney was a resident of that county.

In summary, while it remains the law of this state that there may be situations in which the right to the effective assistance of counsel can be safeguarded only by the appointment of additional counsel, State v. Barfield, supra, such a situation is not present in this case. There has been no showing that the burdens which were shouldered by defense counsel in the representation of their client were so disproportionate to that borne in the usual course of criminal defense work required the court to appoint another attorney to provide assistance.

By his second assignment of error, defendant contends that the trial court erred in denying his motion to suppress a photographic

---

[3]According to the 1970 census, Johnston County has a land area of 797 square miles and a population of 61,737 which is 77 percent rural. North Carolina Manual 136 (1979).

identification of him which was made by Patsy Ann Mason. In support of this contention, defendant offers three distinct grounds for his objection, suggesting that the procedure in question violated his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution. We find no merit in this assignment.

In 1970, defendant pleaded guilty to a charge of second-degree murder in Cumberland County. In 1977, he was placed on parole, subject to continued supervision by the Department of Correction. A condition of his parole required defendant to report promptly to his parole officer when instructed to do so, as well as in the manner prescribed by his parole officer.

On 20 July 1979, Charles Mann was a parole officer with the Department of Correction and was supervisor of parole officers in Lee and Harnett Counties. In that capacity, he served as immediate supervisor of defendant's parole officer. It is the policy of the Department of Correction to maintain up-to-date photographs of parolees in its files. On 20 July 1979, the only photograph of defendant in the files of the department had been taken on 26 May 1976.

Before 20 July 1979, the files of the Sanford probation office had been routinely available to law enforcement officers in general, and agents of the State Bureau of Investigation in particular. On 20 July 1979, agents of the S.B.I. informed Mr. Mann that defendant was a suspect in the investigation of the murder of Carol Ann Hinson and the assault of Patsy Ann Mason. Accordingly, they requested that Mr. Mann allow them to review defendant's parole file. The request was granted. Upon making the ensuing review of the file, agents of the S.B.I., as well as officers of the Sanford Police Department, requested that Mr. Mann secure a more recent photograph of defendant for their use.

On the afternoon of 20 July 1979 between the hours of 3:00 and 3:30, Mr. Mann went to defendant's place of employment, Brackett Steel Company. Mr. Mann asked defendant to report to the parole office to have his picture taken. The officer told defendant that the files were being updated and that the picture which the files

already contained was not current. Later that same day, defendant reported to the office as he had been instructed to do.

After the photograph was made and a print was developed, law enforcement officers prepared two manilla folders containing various photographs. The photographs portrayed black men whose hair was braided or plaited. The second folder contained a series of photographs of black men whose complexions varied and whose clothing differed. The photograph of defendant that had been obtained at the probation office was placed in the second folder.

Both folders were taken to Duke Medical Center where they were displayed before Patsy Ann Mason. There is no evidence in the record which would tend to suggest that the photograph of defendant was in any way singled out by the officers for the special attention of Patsy. The girl picked out defendant's photograph within moments of opening the second folder.

Defendant made a pretrial motion to suppress the photographic identification. After conducting a voir dire, the court overruled defendant's motion. There was no error.

Defendant initially contends that the photographic identification ought to be suppressed because the procedure violated his Sixth Amendment right to counsel. We disagree. The Sixth Amendment right to counsel attaches only upon the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972); State v. Matthews, 295 N.C. 265, 245 S.E. 2d 727 (1978), cert. denied, 439 U.S. 1128 (1979); State v. Finch, 293 N.C. 132, 235 S.E. 2d 819 (1977). At the time defendant was photographed, he had not been formally charged with any offense. While it is true that the investigation had narrowed its focus upon him, it had not so progressed that the state had committed itself to prosecute. It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the Sixth Amendment

right to counsel is triggered as a guarantee.

Nor was defendant's Fifth Amendment privilege against self-incrimination violated when he was photographed in the parole office. It is well established that routine police procedures such as the taking of handwriting samples, blood samples, fingerprints, and hair samples from a defendant, as well as the taking of his photograph are outside the scope of the Fifth Amendment guaranty because the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); State v. Wilson, 296 N.C. 298, 250 S.E. 2d 621 (1979); State v. Wright, 274 N.C. 84, 161 S.E. 2d 581 (1968), cert. denied, 396 U.S. 934 (1969).

Similarly, we are not persuaded that defendant's Fourth Amendment rights were violated by the taking of his photograph. The Fourth Amendment offers no shield for that which an individual knowingly exposes to public view. Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); State v. Leggette, 292 N.C. 44, 231 S.E. 2d 896 (1977). It follows, therefore, that an individual's personal traits, such as his facial appearance or the tone and manner of his voice, are not within the purview of the Fourth Amendment's protection against unreasonable searches and seizures. One does not have a reasonable expectation of privacy in those features which serve to distinguish one individual from another and which are exposed to the view of others as a matter of course. United States v. Dionisio, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973); Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969); State v. Sharpe, 284 N.C. 157, 200 S.E. 2d 44 (1973).

In a related assignment of error, defendant contends that the trial court erred by failing to suppress his in-court identification by Patsy Ann Mason. This assignment is without merit.

During her direct examination, Patsy was asked if she saw the man who had come into her bedroom on the evening of 14 July 1979 seated in the courtroom. Over objection, she was permitted to identify defendant. Defendant now argues that the trial court should have ordered a voir dire at that point so that he could have inquired as to her opportunity to view her assailant, as well as the manner in which she identified defendant's photograph among those which she viewed in her hospital room at Duke Medical Center.

The record reveals that defendant made a pretrial motion to suppress any identification of him by Patsy. After a voir dire was held, the trial judge made findings of fact and conclusions of law in an order which denied defendant's motion. While it is true that Patsy did not testify at the hearing, no right of defendant was denied by the proceeding. The gist of defendant's complaint is that he was denied the opportunity to question the prosecuting witness as to the circumstances surrounding her photographic identification of him, as well as her opportunity for observation of her assailant. In no way can it be said that defendant was denied his right of confrontation. There is no requirement that the state call any particular witness at a voir dire which is held on a motion to suppress. The evidence which was adduced at the voir dire does not in any way suggest that defendant's photograph was singled out for the special attention of Patsy. Furthermore, the record does not suggest that defendant was prevented from calling Patsy as a witness at voir dire. Defendant's lack of an opportunity to question the prosecuting witness in this regard stemmed not from the action of the court but from a tactical decision made on his behalf prior to trial.

By his third assignment of error, defendant contends that the trial court erred in denying him the opportunity to make an opening statement. There is no merit in this assignment.

G.S. § 15A-1221(a)(4) provides that the defendant in a criminal case, as well as the state, must be given the opportunity to make a

brief opening statement. The record before us in the present case is completely silent with respect to any mention by either the trial court or defense counsel concerning an opening statement. It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. State v. Gaiten, 277 N.C. 236, 176 S.E. 2d 778 (1970). It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. State v. Parks, 290 N.C. 748, 228 S.E. 2d 248 (1976). In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court. City of Durham v. Manson, 285 N.C. 741, 208 S.E. 2d 662 (1974); State v. Braswell, 283 N.C. 332, 196 S.E. 2d 185 (1973). By his failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right. Therefore, his conduct at trial amounts to a waiver of this procedural right.

Defendant's fourth assignment of error relates to the testimony of John Earl Mason. Mr. Mason testified that after Carol's body had been removed from his house and Patsy had been taken to a hospital for treatment, he and his wife were taken to the Sanford Police Department so that they could make several phone calls. While they were at the police station, the Masons talked by telephone with Cliff Ferguson, a friend of Terry Hinson, the mother of Carol. The Mason couple had adopted Carol and her brother, Jerome. Ms. Hinson was the daughter of Mrs. Mason. Ms. Hinson had instructed the couple to call Mr. Ferguson's home in the event that she was needed. On cross-examination of Mr. Mason, defendant sought to establish that Mr. Ferguson was killed the next day. The objection of the district attorney was sustained, and Mr. Mason was not permitted to answer the question.

There was no error. Defendant argues that the evidence was relevant to establish the violent atmosphere which surrounded the Mason household in that it tended to establish a connection between

two deaths, that of Carol Ann Hinson and that of Cliff Ferguson. The only connection between the two deaths that has been demonstrated to this court is the relationship of the decedents to Terry Hinson. Ms. Hinson not only was Carol's mother, she was also a friend of Mr. Ferguson. No other connection is apparent or has been demonstrated. While it remains the general rule that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue, e.g., State v. Banks, 295 N.C. 399, 245 S.E. 2d 743 (1978), no such tendency exists in regard to a purported connection between the two deaths. Indeed, such evidence, nothing else appearing, would have done nothing in the present case except confuse the issues before the jury.

Similarly, it was not error for the trial court to refuse to permit defendant to cross-examine Mr. Mason with respect to whether he was the beneficiary of any insurance on Carol's life. In the absence of the jury, Mr. Mason testified that an insurance company had paid him the sum of $5,000 upon the child's death. We are unable to agree with defendant's contention that the evidence was relevant on the question of a motive Mr. Mason would have had in regard to the death of Carol. Such an argument is purely speculative in that it finds no support whatsoever in the record. Evidence that a crime was committed by another must point unerringly to the guilt of another. State v. Jenkins, 292 N.C. 179, 232 S.E. 2d 648 (1977); State v. Smith, 211 N.C. 93, 189 S.E. 175 (1937). Evidence which does no more than cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another is inadmissible. State v. Shinn, 238 N.C. 535, 78 S.E. 2d 388 (1953).

Defendant also contends that the trial court erred in its charge to the jury in two respects. He first submits that evidence favorable to him which had been elicited on cross-examination was not summarized for the jury as was the case with evidence favorable to the state. This contention is controlled by State v. Moore,

____ N.C. ____, ____ S.E. 2d ____ (No. 4, Fall Term 1980), in which we held that while a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect.

In the present case, the trial judge failed to instruct the jury, among other things, that no bloodstains had been found on defendant's bicycle, his underclothing, or on the nunchukas which had been seized by police. Nor did the trial judge undertake to direct the jury's attention to the fact that Patsy had worn glasses since the first grade or that she was unable to say that the state's exhibit 8, a set of nunchukas, was the weapon which she had seen in the back pocket of her assailant. All of this evidence, while competent, goes to affect the weight to be accorded these matters rather than the establishing of a substantive defense, as was the case in State v. Sanders, 298 N.C. 512, 259 S.E. 2d 258 (1979).

Similarly, it was not error for the trial judge to instruct the jury that while defendant had elected not to present any evidence, they were not to allow that decision to influence their deliberations. We have repeatedly held that while it is the better practice for a trial judge not to instruct on a defendant's election not to testify or otherwise offer evidence absent a request, such an instruction does not constitute reversible error. E.g., State v. Covington, 290 N.C. 313, 226 S.E. 2d 629 (1976).

PHASE II - SENTENCE DETERMINATION

Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those which were submitted. We conclude that the trial court did not err in this respect. See State v. Barfield, supra; State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979).

As a check against the capricious or random imposition of the death penalty, G.S. § 15A-2000(d)(2) authorizes this court to review

the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have carefully reviewed the record of defendant's trial. We have given serious consideration to the briefs and arguments which have been presented to us. It is our conclusion that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. Nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Considering the brutal manner in which Carol Ann Hinson was murdered and Patsy Ann Mason was seriously injured, and considering defendant's prior history of violent criminal behavior, we conclude that the sentence of death in this case is not excessive and that we should not exercise the discretion given us by statute to set aside the sentence imposed.

No error.

Justice Brock took no part in the consideration or determination of this case.

APPENDIX B

No. 80 ELEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1980

**********

| | | |
|---|---|---|
| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v | ) | From Johnston |
| | ) | No. 79CRS15665 |
| ROBERT HENRY McDOWELL | ) | |

ORDER STAYING EXECUTION OF DEATH SENTENCE

Defendant was indicted for first-degree murder and convicted at the December 3, 1979 Criminal Session of Johnston County Superior Court. Defendant was sentenced to death in an order entered by Judge Donald L. Smith on December 11, 1979.

In an opinion filed November 4, 1980, this Court found no error in either the guilt-determination phase or sentencing phase of defendant's trial. Defendant's death sentence was thus undisturbed. Defendant's attorney filed with this Court on November 17, 1980, a motion for stay of execution of the death sentence on the ground that he intends to file a petition for writ of certiorari in the Supreme Court of the United States pursuant to Rule 22 of that Court.

It is therefore ORDERED:

1. That defendant's execution be and the same is hereby stayed pending further orders of this Court.
2. That defendant shall remain in the custody of the Department of Correction pending further orders of this Court.
3. That defendant serve a copy of his petition to the Supreme Court of the United States on the Attorney General of North Carolina and the Clerk of this Court.

4. That a certified copy of this order be served on the Warden of Central Prison in Raleigh, North Carolina.

This the 17th day of November 1980.

Joseph Branch

JOSEPH BRANCH, CHIEF JUSTICE
SUPREME COURT OF NORTH CAROLINA

The foregoing order is issued over my hand and seal of the Supreme Court this 17th day of November, 1980.

John R. Morgan

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: Lester V. Chalmers, Jr., Special Deputy Attorney General
T. Jefferson Ward, Attorney at Law
John W. Twisdale, District Attorney
Will R. Crocker, Clerk of Superior Court
Warden of Central Prison

A TRUE COPY

CLERK

BY Terry E. Watkins

Nov 17 '80

# APPENDIX C

80-6127

North Carolina General Statute 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. -- (a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matters relating to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commissic by the defendant of other crimes of violence against another perso. or persons.

(f) Mitigating Circumstances. -- Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2.)

# APPENDIX D

STATE OF NORTH CAROLINA

COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUST

SUPERIOR COURT DIVISION

FILE # 79 CrS 15665

STATE OF NORTH CAROLINA )
Plaintiff )
)
VS )
)
Robert Henry McDowell )
Defendant )

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER YES

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Robert Henry McDowell been previously convicted of a felony involving the use of violence to the person?

ANSWER YES

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER YES

(3) Was this murder for which defendant stands convicted part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person. ANSWER YES

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES" PROCEED TO IS TWO.

Issue Two:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the

imposition of the death penalty?

ANSWER yes

IF YOU ANSWER ISSUE TWO, "NO," SKIP ISSUES THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE TWO "YES," PROCEED TO ISSUE THRE

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE WRITE YE AS TO THOSE YOU FIND TO EXIST BY THE PREPONDERANCE OF THE EVIDENCE AND N IN THE SPACE PROVIDED FOR THOSE THAT YOU DO NOT SO FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENC WRITE, "YES," IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIN ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

(1) Robert Henry McDowell has no significant history of prior criminal activity.

ANSWER: NO

(2) Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER: yes

ANSWER ISSUE FOUR WHETHER YOU ANSWERED ISSUE THREE, "YES" OR "NO."

Issue Four

Do you unanimously find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER yes

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "YES," INDICATE YOUR RECOMMENDATION UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONM OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Robert Henr McDowell be sentenced to Death

This 11 day of December

David Ricky Baldwin (signa
Foreman of the Jury